United Nations

AT

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 891

Case No. 995: PARKER

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Mayer Gabay, Vice-President; Mr. Kevin Haugh;

Whereas at the request of William John Parker, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended to 30 September 1997 and 31 January 1998, the time-limit for the filing of an application with the Tribunal;

Whereas, on 18 December 1997, the Applicant filed an application requesting the Tribunal, inter alia:

"...

c. To uphold the recommendation of the Joint Appeals Board made on 10 December 1996 (...);

d. ... to order payment to the Applicant with effect from 1 January 1995 of all the emoluments and benefits due to him if promotion to P-4 had been effective on that date, including increased pension provision."

Whereas the Respondent filed his answer on 12 March 1998;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 28 May 1978, on a short-term appointment for thirteen days, as a Verbatim Reporter, at the TR II NL level, with the then Department of Conference Services, now Office of Conference and Support Services (OCSS). Thereafter, he served on a series of short-term appointments, until 5 June 1983, when he was granted a probationary appointment, as a Verbatim Reporter, at the P-3 level. On 1 June 1985, his appointment was converted to permanent. On 1 November 1994, the Applicant was promoted to the P-4 level. On 30 June 1996, he retired from the Organization.

On 15 November 1993, a new placement and promotion system was adopted under ST/AI/390, providing, in part, as follows: "In the case of promotions, the earliest possible date for the implementation of such a promotion will be the first of the month following the decision of the Secretary-General to promote, subject to the availability of a post."

On 1 January 1994, the Applicant was assigned to perform functions at the P-4 level as Verbatim Reporter in OCSS. On 19 January 1994, a P-4 post was advertised for internal recruitment through Vacancy Announcement No. 94-T-OCS-208-NY. The Applicant was the only candidate to apply for the post.

By memorandum dated 16 March 1994, the Director of Personnel informed all heads of departments and offices, as follows:

> "... You will recall that transitional cases were to be submitted without delay, with the collaterals considered, to the Appointment and Promotion bodies, in order to proceed with full implementation of the new Placement and Promotion System.
>
> As four months have passed since the Placement and Promotion System became effective, OHRM [Office of Human Resources and Management] and the Appointment and Promotion bodies will not be able to consider any transitional cases received after 31 March 1994."

On 29 April 1994, a Departmental Review Panel was established, which, on 3 August 1994, recommended the Applicant for the post. On 8 September 1994, this recommendation was presented to the Appointment and Promotion Committee and accepted by that body on 27 October 1994. On 1 November 1994, the Assistant Secretary-General for Human Resources Management, on behalf of the Secretary-General, approved the recommendation. The Applicant was promoted to the P-4 level, with effect from 1 November 1994.

In a memorandum dated 17 November 1994, the Director of OCSS requested the Director, Recruitment and Placement Division, OHRM, to authorize, among other things, a retroactive implementation of the Applicant's promotion to 1 January 1994, the date that the Applicant assumed the functions of his P-4 post. In a reply dated 28 November 1994, the Director, Recruitment and Placement Division, OHRM, informed the Director of OCSS that he was unable to approve his request, stating in relevant part:

> "[T]he policy contained in ST/AI/390, which specifically provides that promotions will be implemented as of the first of the month following the date of approval on behalf of the Secretary-General, has been strictly implemented since November 1993. To change such policy retroactively in favour of OCSS staff members would lead to serious difficulties and would imply re-opening all previous cases since November 1993."

On 5 June 1995, in response to a request from the Executive Office of OCSS dated 19 April 1995, OHRM approved a special post allowance for the Applicant for a period of seven months, with retroactive effect from 1 April 1994 through 31 October 1994.

On 15 March 1995, the Applicant requested the Secretary-General to review the administrative decision not to implement his promotion retroactively to 1 January 1994. On 23 June 1995, he lodged an appeal with the Joint Appeals Board (JAB).

The JAB adopted its report on 10 December 1996. Its considerations, conclusions and recommendations read, in part, as follows:

"Considerations

...

24. The Panel was of the view that OHRM should have entertained the request of the Director for Conference Services, for by denying the request, the Appellant has been unfairly treated.

25. The Panel noted that the Appellant, in paragraph four of his letter to the Secretary-General dated 15 March 1995 requesting a review of the administrative decision not to implement his promotion from the P-3 to the P-4 level effective 1 January 1994, had stated:

> 'The current interpretation of [ST/AI/309, para. 19], creates an injustice, as demonstrated by the promotion of another staff member in the Verbatim Reporting Section, who was placed against a P-4 post on 1 November, who was promoted on 1 November, as I was, and whose promotion was made effective on 1 November, as in my case, while I had been encumbering a P-4 post for ten months.'

The Panel noted that the Respondent has not denied the factual accuracy of paragraph four of the Appellant's letter to the Secretary-General, which depicts unfair treatment.

26. The Panel noted, also, that the Respondent has not denied that prior to the issuance of ST/AI/390 on 15 November 1993 by the Under-Secretary-General for Administration and Management, the prevailing practice was that, subject to satisfactory performance, the promotion of someone already encumbering a higher-level post was made retroactive to the date on which he or she first encumbered that post.

27. The Panel determined that the intent of ST/AI/390, para. 19, was surely based on the expectation that the appropriate bodies would meet regularly and act expeditiously. This surely was not true in the Appellant's case, for which he is not to blame, where: (i) although the deadline for submission of applications was 9 February 1994, the Departmental Review Panel was not established until 29 April 1994; (ii) the Departmental Review Panel delayed for more than three months before meeting on 3 August 1994 to review the Appellant's application; (iii) the Department delayed for more than a month, following the Department[al] Review Panel's recommendation, before making its recommendation to the APC; and (iv) the APC delayed for almost two months before making its recommendation of the Appellant for the post.

28. The Panel was of the view, and agreed with the Appellant, that a staff member should not have to suffer because of difficulties experienced by the Administration in putting into place a new system whose intricacy has not be worked out over several months, thus penalizing a staff member already performing duties at a higher level whose promotion happens to be recommended during the changeover period.

Conclusions and Recommendations

29. Based on the foregoing, the Panel unanimously agreed that the Appellant was unfairly treated by the Respondent's decision to implement the Appellant's promotion from the P-3 to the P-4 level effective 1 November 1994, instead of 1 January 1994 when the Appellant assumed the higher-level functions at the P-4 level, and that the decision was inconsistent with the spirit and intent of ST/AI/390.

30. The Panel unanimously recommends that the Appellant's appointment [sic] from the P-3 to the P-4 level be made effective 1 January 1994, when the Appellant assumed the higher-level functions at the P-4 level."

On 12 March 1997, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and informed him as follows:

"The Secretary-General does not share the view of the Board that the decision to implement your promotion effective 1 November 1994 was unfair and inconsistent with ST/AI/390. The policy stipulated in paragraph 19 of the Administrative Instruction regarding the earliest possible date for the implementation of a promotion was fully respected in your case. The Secretary-General has inquired further into the matter and has been informed that there was no differential treatment in favour of another staff member in your Department who was also promoted effective 1 November 1994. In fact that staff member was promoted at the same time as she undertook her functions because she was selected for the higher post over another candidate who had been supported by the Department and who had been carrying out the higher functions until then. Although there was some delay in the processing of your case due to the novelty of the system established under ST/AI/390, you were compensated for carrying out those higher functions by receiving a Special Post Allowance. For these reasons, the Secretary-General has decided not to accept the Board's recommendation and to take no further action in respect of your case."

On 18 December 1997, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contention is:

The Applicant's promotion should have been granted with retroactive effect from 1 January 1994, when he first assumed the functions of his higher-level post.

Whereas the Respondent's principal contentions are:

1. The Applicant has no right to promotion, let alone to a promotion at a specific time.

2. The effective date of the Applicant's promotion was determined in accordance with the promotion procedure applicable at the time.

3. There is no evidence that the decision to implement the Applicant's promotion as of 1 November 1994 resulted in unfair treatment.

The Tribunal, having deliberated from 7 July to 7 August 1998, now pronounces the following judgement:

I. The Applicant appeals from a decision by the Secretary-General, dated 12 March 1997, whereby the Secretary-General rejected the Joint Appeals Board's (JAB) recommendation and maintained his decision to promote the Applicant to the P-4 level, with effect from 1 November 1994.

II. The Applicant requests the Tribunal to order the Respondent to accept the recommendation of the JAB and to implement the Applicant's promotion with retroactive effect from 1 January 1994, when he assumed the higher level functions at the P-4 level. In

addition, he seeks payment of all the emoluments and benefits to which he would thereby be entitled, including increased pension benefits, calculated on the basis of the retroactive promotion.

III. The Tribunal must determine whether the Applicant's rights were violated when his promotion was implemented with effect from 1 November 1994 instead of 1 January 1994.

In its report dated 10 December 1996, the JAB concluded as follows:

> "... the Panel unanimously agreed that the Appellant was unfairly treated by the Respondent's decision to implement the Appellant's promotion from the P-3 to the P-4 level effective 1 November 1994, instead of 1 January 1994 when the Appellant assumed the higher-level functions at the P-4 level, and that the decision was inconsistent with the spirit and intent of ST/AI/390."

Administrative instruction ST/AI/390 provides that:

> "19. In the case of promotions, the earliest possible date for the implementation of such promotion will be the first of the month following the decision of the Secretary-General to promote, subject to the availability of a post."

The new placement and promotion system set forth in ST/AI/390 came into effect on 15 November 1993. Information circular ST/IC/1993/66 on Placement and Promotion dated 2 December 1993, which was issued in connection with ST/AI/390, provides that:

> "14. For posts which became vacant during the transitional period, i.e. from 1 July 1993 to 15 November 1993, or before, cases should be presented to the appropriate appointment and promotion bodies without delay, together with the list of collaterals considered. ..."

IV. The Applicant's post became vacant on 1 January 1994, when the staff member who previously encumbered the post retired from the Organization. It is clear that the

transitional period applied to posts which had become vacant from 1 July 1993 to 15 November 1993 or before. The Applicant claims, however, that the transitional period was extended by the Director of Personnel in a memorandum dated 16 March 1994. The Tribunal finds, however, that this memorandum did not change the definition of transitional cases; it only extended the deadline for submission of such cases to the Office of Human Resources and Management (OHRM) and the appointment and promotion bodies until 31 March 1994. In the view of the Tribunal, the Applicant's promotion was not a transitional case since it did not fall within the time period in question. Accordingly, the provisions of administrative instruction ST/AI/390 apply to his case.

V. Staff rule 103.11(a) requires that staff members "assume temporarily, as a normal part of their customary work ... duties and responsibilities of higher level posts".

As compensation for such work, staff rule 103.11(b) provides that:

> "... a staff member who is called upon to assume the full duties and responsibilities of a post at a clearly recognizable higher level than his or her own for a temporary period exceeding three months may, in exceptional cases, be granted a non-pensionable special post allowance from the beginning of the fourth month of service at the higher level."

The Applicant did in fact receive such a special post allowance (SPA) commencing 1 April 1994, through 31 October 1994.

VI. The Applicant is asking the Tribunal to order that his promotion be implemented with effect from 1 January 1994, the date on which he assumed the higher level functions. During the JAB proceedings the Applicant pointed to a certain staff member of the Office

of Conference and Support Services, who was promoted to a P-4 post on the same day that she assumed the functions of that post. The JAB found that the Applicant was treated unfairly, because he had been assuming the functions of his new P-4 post for ten months prior to his promotion, whereas the other staff member assumed the functions of her P-4 post on the same day that she was promoted. The Under-Secretary-General for Administration and Management explained in his letter of 12 March 1997:

> "... The Secretary-General has inquired further into the matter and has been informed that there was no differential treatment in favour of another staff member in your Department who was also promoted effective 1 November 1994. In fact that staff member was promoted at the same time as she undertook her functions because she was selected for the higher post over another candidate who had been supported by the Department and who had been carrying out the higher functions until then. ..."

The Applicant now argues that the matter of the other staff member "relates to an administrative injustice that could and should have been righted by administrative action" but that the "Applicant referred to the promotion of the other staff member merely to give an example of the scale of that injustice ..." The Tribunal, however, does not find that any such injustice was committed in this case through the Respondent's implementation of the new promotion policy.

VII. The Tribunal is satisfied that the Respondent was guided by considerations of equal treatment and consistent application of the promotion procedure. In addition, the Tribunal considers that even though there may have been some delay in processing the Applicant's case due to the novelty of the system, the Respondent properly compensated the Applicant for his having performed the functions of the higher post by granting him an SPA.

VIII. For the foregoing reasons, the application is rejected in its entirety.

(Signatures)

Hubert THIERRY
President

Mayer GABAY
Vice-President

Kevin HAUGH
Member

Geneva, 7 August 1998

R. Maria VICIEN MILBURN
Executive Secretary